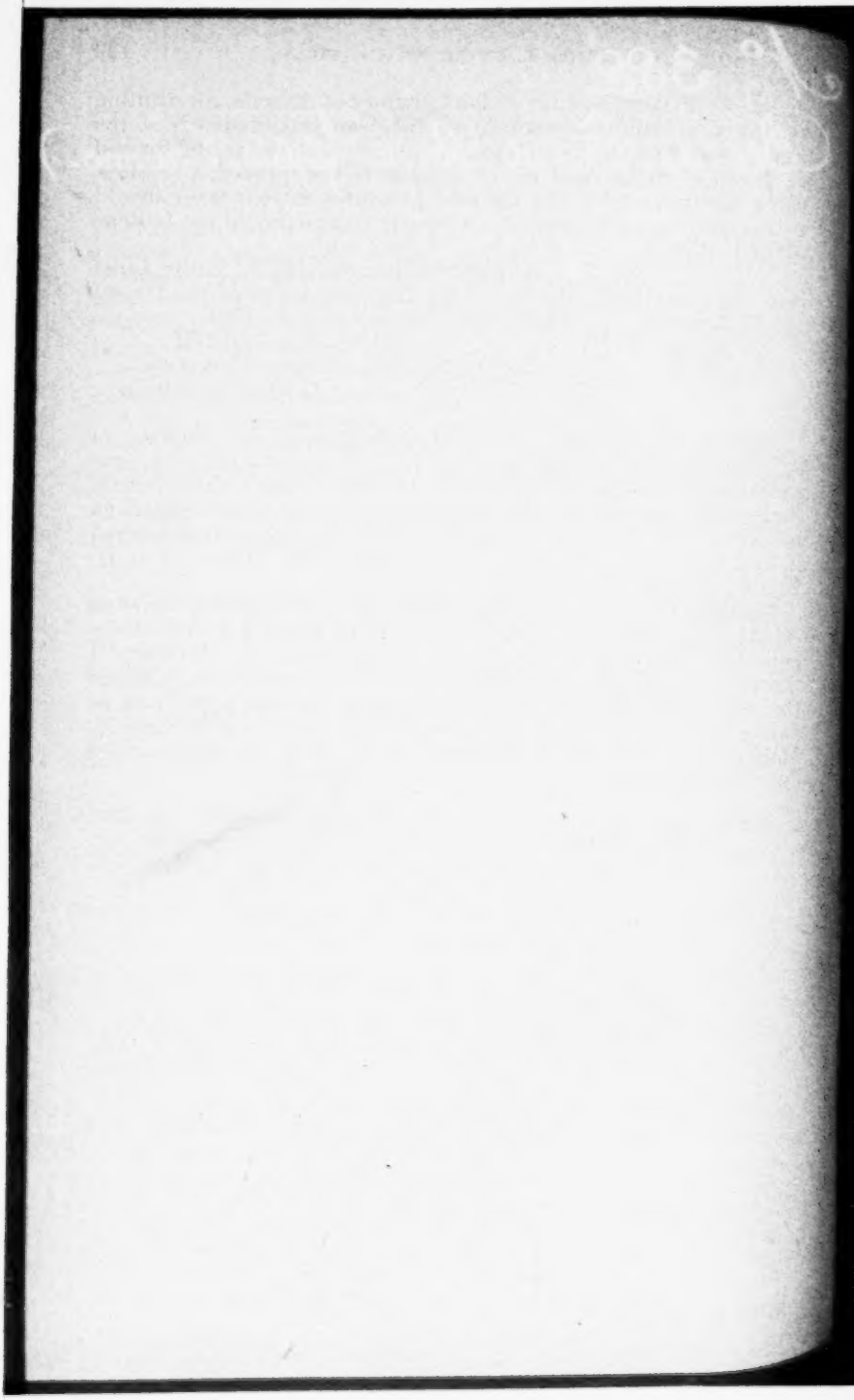

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 388.

N. O. MURPHY ET AL., LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA,

vs.

JAMES L. UTTER ET AL.

REPLY OF APPELLANTS TO MOTION TO ADVANCE.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Come now appellants by their counsel, and in reply to the motion of appellees to advance this cause, respectfully submit that said motion should not be granted because:

First. This case has never been adjudicated by this court upon the merits, and therefore does not come within the provisions of paragraph 4 of rule 26.

In the case of Utter *vs.* Franklin, 172 U. S., 416, in giving the statement of the case this court said:

"Defendants demurred to the petition, and for answer thereto averred that the bonds now held by the plaintiffs

had been declared both by the supreme court of the Territory and this court to be void, and therefore the petition of the relators should be dismissed."

The judgment of the lower court which was appealed from in Utter *vs.* Franklin appears on page 10 of the record in that case, and referring to it we see that it is as follows:

"And the court being fully advised in the premises, it is ordered that the petition for the writ of mandamus herein be, and the same is hereby, denied."

This is manifestly a judgment sustaining the demurrer to the petition and nothing more. That ruling was reversed by this court, and the effect of the decision of this court and the remanding of the case "for further proceedings not inconsistent with the opinion" is nothing more than a direction to the lower court to overrule instead of sustaining defendants' demurrer to the petition.

The assignment of errors prepared by "W. H. Barnes, attorney for petitioners," in Utter *vs.* Franklin, appears on page 11 of the record therein. It was alleged as error—

"First. That the court erred in holding that the petition did not state facts sufficient to sustain the remedy asked for.

"Third. That the court erred in sustaining the demurrer to the petition in said cause."

There is a further assignment that "the court erred in refusing to sustain the demurrer to the special defense set up in bar in the answer of the respondents." If, however, the first and third assignments are valid, the decision was on the demurrer to the petition, and the court did not get beyond this point. If the court held that "the petition did not state facts sufficient to sustain the remedy asked for," it was not necessary, or even possible, to consider the sufficiency of the answer.

The opinion of this court construed the various acts of the legislature and of Congress and held that the demurrer to

the petition should be overruled, and that the supreme court of Arizona should take further proceedings not inconsistent with the opinion of this court.

Thereupon the respondents in Utter *vs.* Franklin filed an amended answer, which for the first time alleged facts going to the merits of the action. They also raised the point that since the decision in Utter *vs.* Franklin the loan commission had been abolished by the legislature of Arizona, and that therefore the petition for a mandamus could not be sustained.

The motion to advance this case states that "the present record presents the same question which was adjudicated by this court on the said former appeal;" but as opposed to this statement we respectfully submit that the present case involves other and different questions. The opinion of the lower court shows that the question whether the loan commission is still in existence was presented and argued, as it will be before this court, and also that there was presented and argued the question whether the bonds sought to be funded "were sold or exchanged in good faith." On this point extended testimony was taken and findings of fact made, which, as appellants have alleged in their assignment of errors, do not support the judgment of the lower court.

Second. There is no other reason why this case should be advanced. The loan commission, if in existence at all, is a continuing body and appellees cannot be injured if this case takes its regular course on the docket.

For the foregoing reasons appellants submit that the motion to advance this case should be denied.

ROCHESTER FORD,
Of Counsel for Appellants.